No. 5727

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN J. BUZARD, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
United States Attorney.
WILLIAM WOLFF SMITH,
General Counsel, United States Veterans' Bureau.
JAMES O'C. ROBERTS,
JAMES T. BRADY,
Attorneys, United States Veterans' Bureau.

U. S. GOVERNMENT PRINTING OFFICE: 1929

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5727

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN J. BUZARD, APPELLEE

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

STATEMENT OF THE CASE

Edwin J. Buzard, hereinafter called plaintiff, applied for and was granted war risk term insurance in the sum of $10,000 while in the Army in the month of November, 1917. Premiums were paid to include the month of June, 1919, on the $10,000 term insurance. No premiums were paid thereafter until effective, March 1, 1920, the plaintiff applied for and there was granted a reinstatement of $5,000 of the term insurance, which insurance was converted into an ordinary life policy effective on the same date and on which premiums were paid only to include May, 1920. On November 3, 1920, plaintiff applied for reinstatement of the remaining $5,000 term insurance. This application

51431—29——1

was rejected. (See answer to amended complaint, R. 11, 12; reply to answer, R. 14; defendant's Exhibit A–1, A–2, R. 50; testimony of plaintiff, R. 56, 57, 66, 67, 68.)

It is alleged in Paragraph III of the amended complaint (R. 8) that on June 18, 1918, while the $10,000 war risk term insurance was in force plaintiff became totally and permanently disabled within the meaning of the contract of insurance. This allegation was denied in Paragraph III of the answer to the amended complaint. (R. 11.)

The answer to the amended complaint (R. 11, 12) set up as a further defense that by reason of the reinstatement and conversion effective March 1, 1920, that the plaintiff was estopped from setting up a total permanent disability prior to that date.

At the close of the plaintiff's case defendant moved for a directed verdict (R. 69) on the ground, among others, that—

> * * * First, the evidence shows that the man on or about March 2d, 1920, made application to the Government for reinstatement of $5,000 of his War Risk Term Insurance and represented that he was then in as good health as at discharge, and knowing or being charged with the knowledge that a policy of War Risk Insurance under the law could not be reinstated, if and when an ex-service man was permanently and totally disabled, did make such representations and obtain the reinstatement of his insurance; second, the evidence shows that on or about

> March 2d, 1920, the claimant applied for a conversion of $5,000 of his War Risk Term Insurance into an ordinary life policy and that such application was accepted and a policy issued; that the plaintiff by accepting such policy is estopped to assert permanent and total disability prior to that date; and, further, that by reason of applying for and receiving such policy with different terms and conditions, there was a merger which terminated all rights under the old War Risk Insurance contract upon which this suit is based.

This motion was denied and an exception taken to the Court's denial thereof on all grounds. (R. 69.) At the close of the case a motion for directed verdict on the grounds above set out was renewed. (R. 85.) Said motion was denied and exception thereto taken. (R. 87.)

The case was submitted to the jury and a verdict was returned finding the plaintiff permanently and totally disabled as from June 30, 1919. (R. 16.) A judgment on the verdict was entered November 14, 1928. (R. 17, 18.) Defendant filed a motion for new trial October 9, 1928. (R. 19.) This motion was denied and exception noted. (R. 20.) From the judgment in favor of the plaintiff defendant is here on appeal.

ASSIGNMENT OF ERRORS

The defendant will rely upon and argue the Assignment of Errors, or parts thereof, as are here set out:

I

The District Court erred in denying defendant's motion for a directed verdict at the close of the plaintiff's case, which motion for directed verdict was interposed on the following grounds:

Second. On the ground that the evidence shows that the man on or about March 2d, 1920, made application to the Government for reinstatement of $5,000 of his War Risk Term Insurance and represented that he was then in as good health as at discharge and knowing, or being charged with the knowledge that a policy of War Risk Insurance under the law could not be reinstated, if and when an ex-service man was permanently and totally disabled, did make such representations and obtain the reinstatement of his insurance; and that

Third. On the ground that the evidence shows that on or about March 2d, 1920, the claimant applied for a conversion of $5,000 of his War Risk Term Insurance into an ordinary life policy and that such application was accepted and a policy issued; that the plaintiff by accepting such policy is estopped to assert permanent and total disability prior to that date; and, futher, that by reason of applying for and receiving such policy with different terms and conditions, there was a merger which terminated all rights under the old War Risk Insurance contract upon which this suit is based.

To which denial the defendant took a separate exception on all grounds at the time of the trial herein.

II

The District Court erred in denying defendant's motion for directed verdict at the end of the entire testimony, which motion for directed verdict was interposed on the following grounds:

Second. The plaintiff is estopped from asserting total disability on the date alleged in the complaint for the reason, in March, 1920, the plaintiff applied for the reinstatement of $5,000 term insurance and stated in his application therefor that he was in as good health as the date of discharge from service, being possessed of full knowledge that he could not reinstate his insurance while totally disabled, thus representing to the defendant he was not totally disabled; that the defendant, through the United States Veterans' Bureau, acting on and as a result of said representation, did reinstate said insurance, and the plaintiff is estopped from asserting total and permanent disability prior to said date.

Third. For the further reason, the evidence shows March 2d, 1920, the plaintiff converted $5,000 of his War Risk Term Insurance into $5,000 ordinary life policy, which policy was issued effective March 1st, 1920, and by such actions there was a merger into said ordinary life insurance policy of War-Risk Insurance and said plaintiff is now estopped from claiming any rights under said term contract, at least to said amount so converted.

Fourth. Under the evidence before the Court, the plaintiff is not entitled to recover in any event

more than $5,000, as the evidence conclusively shows $5,000 was merged into a Government insurance policy of ordinary-life insurance which contains terms and conditions entirely different and benefits now accorded to the plaintiff under his term insurance originally applied for and sued for in this action and under which no claims are made by the plaintiff in his complaint.

To which denial the defendant took a separate exception on all grounds at the time of the trial herein.

VI

The District Court erred in refusing to give defendant's additional requested instruction No. 1, which additional requested instruction is as follows:

> You are instructed that if you find that the plaintiff on or about March 2, 1920, applied for and was granted a conversion of Five Thousand ($5,000) Dollars of his war-risk term insurance into a Five Thousand ($5,000) Dollar policy of ordinary life war-risk insurance, then and in such event, you are instructed that the plaintiff is not entitled to recover on the insurance so converted, and in such event could not recover on more than Five Thousand ($5,000) Dollars war-risk insurance;

to which refusal the defendant took timely exception herein.

VII

The District Court erred in refusing to give defendant's additional requested instruction No. 2, which additional requested instruction No. 2 is as follows:

> If you find from the evidence that the plaintiff, on or about March 2, 1920, applied for the reinstatement of Five Thousand ($5,000) Dollars war risk term insurance, and a conversion of the same into an ordinary life policy of war risk insurance, and said life policy was issued and that he stated in his said application therefor that he was in as good health as at the date of his discharge from service, then and in such event, you are instructed that you can not find the plaintiff to have been totally and permanently disabled prior to the time of said application for reinstatement and conversion;

to which refusal the defendant took timely exception herein.

IX

The District Court erred in entering judgment upon the verdict herein, when the evidence adduced at the trial of this action was insufficient to sustain the verdict or the judgment.

PERTINENT STATUTES AND REGULATIONS

Section 400 of the Act of October 6, 1917 (40 Stat. 409):

> That in order to give every commissioned officer and enlisted man and to every mem-

ber of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

Section 402 of the Act of October 6, 1917 (40 Stat. 409):

> That the Director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * *

Section 404 of the Act of October 6, 1917 (40 Stat. 410):

> * * * Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance. * * *

Section 13 of the Act of October 6, 1917 (40 Stat. 398, 399):

> That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose

> have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes. * * *

Bulletin No. 1, being the terms and conditions of soldiers' and sailors' insurance, promulgated October 15, 1917, provided among other things:

> * * * If the insured became totally and permanently disabled before this policy was applied for, it shall nevertheless be effective as life insurance, but not as insurance against such disability.
>
> * * * * *
>
> * * * If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau.

Treasury Decision No. 47 W. R., promulgated July 25, 1919, pursuant to Section 13 of the War Risk Insurance Act, and in force on March 2, 1920, when this plaintiff applied for reinstatement, provides where material as follows:

> 2. In every case where reinstatement, in whole or in part, of lapsed or cancelled insurance is desired, the insured shall file with the Bureau of War Risk Insurance a signed application therefor, and make tender of the premium for one month (the grace period) on the amount of insurance to be reinstated,

and also of the amount of at least one month's premium on the reinstated insurance. In cases where the insured desires to convert his lapsed term insurance he shall make tender of the premium for one month (the grace period) on the amount of term insurance to be reinstated and converted, and also of the first premium on the converted insurance.

3. Insurance lapsed or cancelled may be reinstated within eighteen months after the month of discharge, provided the insured is in as good health as at date of discharge or at the expiration of the grace period, whichever is the later date, and so states in his application; * * *.

Regulations of the Bureau, promulgated pursuant to statutory authority, have the force and effect of law and the Court will take judicial notice thereof. (*Cassarello* v. *U. S.* 279 Fed. 396, C. C. A. (3rd); *Sawyer* v. *U. S.*, 10 Fed (2d) 416, C. C. A. (2nd).)

ARGUMENT

POINT I

By reason of the reinstatement of $5,000 term insurance and the conversion thereof to an ordinary life policy effective March 1, 1920, plaintiff was estopped from asserting a permanent and total disability prior to that date

The record is sufficiently clear to warrant the statement that it is undisputed that on the plaintiff's $10,000 war risk term insurance no premiums were paid after the month of June, 1919, as appears

from the plaintiff's application for reinstatement dated March 2, 1920 (Government's Exhibit A–1), the affirmative defense of the Government in the answer to the amended complaint (R. 11), and the testimony of the plaintiff where he says (R. 56): "As far as I know my premiums were paid up to June, 1919."

The defendant in its answer to the amended complaint (R. 11) alleged that effective March 1, 1920, on application of the plaintiff, $5,000 of the original $10,000 term insurance, on which premiums had been last paid to include June, 1919, was reinstated and converted. This the plaintiff admitted in his reply. (R. 14.) The plaintiff in his reply sought to avoid the effect of said reinstatement and conversion on the ground that he was in ignorance of the contents of the applications for reinstatement and conversion which he made; that he signed same under mistake and misapprehension; that, further, the defendant was not induced to forego any of its (the defendant's) rights by any such representations of plaintiff and that therefore the plaintiff is not estopped from claiming rights under his original $10,000 contract of term insurance. (R. 14, 15.)

There we have the issue. The plaintiff contends that the reinstatement and conversion following the lapse of the policy does not preclude him from asserting permanent and total disability during the life of the original $10,000 term contract. The defendant says that said reinstatement and conver-

sion is an estoppel by contract. The pertinent statutes and regulations hereinbefore quoted clearly show that Congress made provisions for insurance protection available to those in the military or naval service; that this insurance protection might be accepted or rejected at the option of each individual member of the military or naval forces; that if accepted the applicant for insurance must not only make application therefor but must also pay premiums thereon so long as such protection is desired and that premiums must be paid thereon both during and subsequent to military or naval service. Each insured had a right to reinstate insurance in accordance with the provisions of regulations promulgated pursuant to the statute; that the contract of insurance afforded protection against permanent and total disability or death when occurring during the lifetime of the contract of insurance only. (Section 404, Brief p. —; Bulletin No. 1, Brief p. —.)

War-risk insurance, like every other kind of insurance, is essentially an indemnity against future loss. It could not be granted to an individual who was permanently and totally disabled any more than it could be granted to one who had previously died. As a basis of entering into such contract, it must be assumed by both parties that the contingencies to be insured against have not already occurred. It is unnecessary to cite any of the numerous authorities to show that an insurance contract is void when there is no risk which can be insured against and that in such contingency money paid as premiums

is unearned and must be returned to the insured. Total disability is one of the contingencies insured against in a contract of war-risk insurance. Plaintiff in requesting reinstatement of $5,000 of his yearly renewable term insurance effective March 1st represented that he was then in as good health as he was at the end of June, 1919, when the last premium under his original $10,000 term-insurance contract was paid. Plaintiff, of course, impliedly represented that he was not permanently and totally disabled when applying for reinstatement, for if he thought or claimed he was then permanently and totally disabled and represented his then state of health, as he did (Government Exhibit A1), comparable to his state of health at the end of June, 1919, it seems unnecessary to suggest that he would not have applied for reinstatement but, rather, would the plaintiff have claimed benefits under the old policy effective at least from June, 1919. It is fundamental that the Government could not issue insurance to one who was permanently and totally disabled and it must have been assumed by both the plaintiff and the Government as a basis of reinstating and converting $5,000 of the hitherto lapsed yearly renewable term insurance that plaintiff was not permanently and totally disabled and is now estopped to deny the fact assumed.

The doctrine of estoppel, certainly an old one, is not even new in its application to contracts of war-risk insurance, for in the case of *Wills* v. *United*

States, tried in the District Court for the District of Montana and reported in 7 Fed. (2nd) 137, Judge Bourquin held that—

> Where a World War veteran, to secure reinstatement of war-risk insurance, represented that he was not permanently and totally disabled, he was thereby estopped to later claim payment of insurance on the ground of total permanent disability alleged to have existed since before the time when he applied for reinstatement of the lapsed policy.

Notwithstanding the absence from the application for reinstatement in the present case of a definite statement that the plaintiff was not permanently and totally disabled, it follows with equal force that it was his intention to so represent his condition of health; that the defendant accepted as a fact that the plaintiff was not permanently and totally disabled when it reinstated and converted the $5,000 insurance. Numerous unreported decisions by Federal District Courts have sustained the Government's defense of estoppel in cases the same and similar to the instant case. There is one District Court decision—*Dobbie* v. *United States,* 19 Fed. (2nd) 656—which it may be argued holds otherwise. It is submitted, however, that this is so readily distinguishable from the question here presented as to require no comment.

The plaintiff, in effect, concedes that ordinarily the defense of estoppel in this case would attach so

as to preclude recovery, but seeks to avoid the effect of estoppel on the ground of ignorance, mistake, and misapprehension and that the defendant by accepting the application for reinstatement and issuing the new policy thereon suffered no damage. But an analysis of the new rights acquired by the plaintiff and the liabilities imposed upon the defendant by reinstating the insurance plainly shows the fallacy of plaintiff's contention. Notwithstanding the fact that plaintiff may then have been permanently and totally disabled, the defendant is now estopped from so asserting and the plaintiff, if he can now prove permanent and total disability subsequent to March 1, 1920, and within the life of the reinstated policy, is entitled to recover. That, it is submitted, is sufficient to meet the contention of the plaintiff when he says that the reinstated policy imposed no new obligations on the defendant.

It is clearly shown from the record that there was no fraud, deceit, or misrepresentation on the part of the defendant in bringing about the application for reinstatement by the plaintiff, for the plaintiff himself testifying (R. 56, 57) says in substance:

> Premiums on my original term insurance contract, so far as I know, were paid up to June, 1919. Thereafter in March, 1920, one Fred Mace, who had known me for years, came to me and said, "I will get some insurance for you," he knowing that at that time I was in bad health. I did not know what I was signing, but he was looking out for my

> welfare and the welfare of my family. *I don't know who Mr. Mace was employed by.* Mr. Mace just told me to sign something and I signed it. I didn't know what it was, but thought it was to get my Government insurance paid to me.

The record further shows that as late as December of 1920 the plaintiff was not claiming total permanent disability, for it appears that he was then writing to the Bureau of War Risk Insurance asking for the refund of premiums remitted in connection with a second application for reinstatement which he had been notified could not be accepted without the completion of further formal requirements, and as to this the plaintiff testifies in substances:

> I don't remember writing a letter on December 13, 1920, asking for the cancellation of my policy and the return of $19.50 that I had paid, but if my brother verifies my signature then I did write the letter.

The brother did verify the signature of said letlet and said letter was received in evidence. (R. 50.)

A case foursquare with the present case is that of William M. Stevens, decided by the United States Circuit Court of Appeals for the Eighth Circuit December 14, 1928, No. 7990, wherein the Circuit Court affirmed the ruling of the trial court in holding that the reinstatement of insurance

estopped the plaintiff from asserting a permanent and total disability prior to such reinstatement. The Court of Appeals said:

> The legal question involved is whether this can be done in view of the changed relationship resulting from the attitude of the parties taken as a basis of the reinstatement made. Our judgment is that it can not be done.
>
> As stated by the trial court, the reinstatement made brought into existence a new contract between the parties and the estoppel for which the Government contends is estoppel by contract. It is not, strictly speaking, a species of estoppel in pais since it is based wholly on a written instrument. The rule is thus stated in 21 Corpus Juris, 1111, par. 111:
>
> "If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud, accident, or mistake."
>
> Mr. Bigelow, in his work on Estoppel, states the rule as follows:
>
> "The estoppel in this class of cases is fixed by the execution of the contract; nothing further need be shown, where the fact in question is clearly agreed or assumed. The question, then, will be whether the fact has been so agreed; * * *.
>
> "On the other hand, this class of estoppel being founded upon contract, it can seldom be an answer to the alleged estoppel, unlike

the case of estoppel by conduct, that the party supposed to be estopped acted in ignorance of the facts and under mistake. There are some exceptions, it is true, but they appear to belong mainly to those cases in which the fact in question turns upon some act done in pursuance of the contract—as in the case of delivery of possession to a tenant constituting the ground of the tenant's estoppel—in distinction from an agreement of the fact itself." Bigelow on Estoppel, Sixth Edition, 496.

In *McFarland* v. *McFarland* (Mo.), 211 S. W. 23, it is held that an express or implied admission which may estop may arise out of a contract by which one is estopped from denying that which he has expressly or by implication agreed to be true. It is further held that—

"It can seldom be an answer to an estoppel founded upon contract, unlike estoppel by conduct, that the party to be estopped acted in ignorance of the facts and under mistake."

And in *Bricker* v. *Stroud Bros.,* 56 Mo. Ap. 183, 188, estoppel by contract is stated to be "a term which is intended to embrace all cases in which there is an actual or virtual undertaking taking to treat a fact as settled." To the same effect is *Delaney* v. *Dutcher*, 23 Minn. 373.

The record convinces that plaintiff in error, without fraud, deceit, misrepresentation, or undue influence, elected to have his insurance reinstated upon the terms speci-

fied in the act permitting reinstatement. To that end, the fact that he was not at that time totally and permanently disabled was assumed. Neither he nor any officer of the Government at that time viewed his disability as permanent. At the time his application was made his recourse against the Government under his certificate of war-risk insurance, which had lapsed for nonpayment of premiums, was at least problematical. By reinstatement he acquired substantial advantages and the Government, from a financial standpoint, sustained corresponding disadvantages. These advantages are not merely nominal—they are substantial. The Government became liable for the payments provided in the insurance contract if plaintiff in error thereafter became permanently and totally disabled or died. It would also be obliged, at the election of plaintiff in error, to convert such insurance into one of the many more desirable forms, including an ordinary life policy, under the provisions of the Act of August 9, 1921, and its amendments. Under such a policy not only would the terms of payment be changed to the advantage of the insured, but liability on the policy would accrue for death from causes other than those of service origin. It could not be pleaded in defense that plaintiff was permanently and totally disabled prior to the date of reinstatement. We think under the facts before us, and the law applicable thereto, that plaintiff in error is estopped to recover upon his original

certificate on the ground of total permanent disability sustained while that certificate was still in force. Judge Bourquin, in the District of Montana, in *Wills* v. *United States,* 7 Federal (2nd) 137, reached this same conclusoin. A contrary view is expressed by the District Court for the Southern District of Texas in *Dobbie* v. *United States,* 19 Federal (2nd) 656. That case, however, may be easily distinguished from the fact that the court found that plaintiff did not intend to make the election to reinstate the policy. It would, in our judgment, be a dangerous precedent to establish that one who voluntarily, and in the absence of fraud or mistake, has obtained reinstatement of insurance under the terms prescribed in the Remedial Act, may thereafter, because of conditions later developing or better understood, repudiate the contract obligations thus entered into. It would open an avenue to fraud and imposition and greatly embarrass the administration of the law. The Government has been extremely liberal in extending and preserving rights which have been technically lost through misfortune or inadvertence.

Point II

In any event no recovery could be had in this suit on the $5,000 insurance which was reinstated and converted

At the close of the plaintiff's case defendant requested the court for certain instructions, among which was the following (R. 73):

ADDITIONAL REQUESTED INSTRUCTION NO. 1

> You are instructed that if you find that the plaintiff on or about March 2, 1920, applied for and was granted a conversion of Five Thousand ($5,000) Dollars of his war risk term insurance into a Five Thousand ($5,000) Dollar policy of ordinary life war-risk insurance, then and in such event you are instructed that the plaintiff is not entitled to recover on the insurance so converted, and in such event, could not recover on more than Five Thousand Dollars ($5,000) war risk term insurance.

The maximum amount of insurance which the plaintiff could carry under the limitations of Section 400 (Brief, p. —) was $10,000. By conversion of $5,000 effective March 1, 1920, plaintiff did not and could not secure an aggregate of $15,000 insurance. The converted insurance contract for $5,000 secured on March 1, 1920, continued in force through the month of May, 1920, as is affirmatively pleaded by the defendant in its answer to the amended complaint (R. 12), which allegation is not denied in the reply of the plaintiff. There is no suggestion that said converted policy of $5,000, which was in force from March 1, 1920, through May, 1920, and which protected the plaintiff during that period and now protects him during that period for permanent and total disability, if permanent and total disability can be shown during that time, is void

or that the plaintiff has surrendered the same or that the same has been or can be canceled by the Government. This converted insurance was substituted for a like amount of term insurance and by this substitution a novation is effected which merges all rights and liability of the term insurance in and under the converted contract of insurance. After conversion the rights of the insured, if any, can only exist under the converted insurance contract. No rights can subsequently be asserted under the contract of term insurance, at least, unless, and until the converted policy has been canceled and the term policy restored. Whether the cancellation of the converted policy and the restoration of the term policy ever can be effected need not be considered here. The fact is that no attempt to effect such an arrangement has ever been made. Under these circumstances it is obvious that the court should have given defendant's additional requested Instruction No. 1, *supra,* and held that if entitled to recover at all under the present action which was founded upon plaintiff's yearly renewable term insurance contract, plaintiff could not recover except on the $5,000 term insurance contract which had not been converted. The trial court clearly erred in entering judgment on the verdict of the jury for the installments payable on the $10,000 insurance.

For the reasons above set forth it is submitted that the judgment entered herein should be reversed.

ANTHONY SAVAGE,
United States Attorney.
TOM DEWOLFE,
Assistant United States Attorney.
WILLIAM WOLFF SMITH,
General Counsel,
United States Veterans' Bureau,
Washington, D. C.
JAMES O'C. ROBERTS,
JAMES T. BRADY,
Attorneys,
United States Veterans' Bureau,
Washington, D. C.

○